United States Government
National Labor Relations Board

Memorandum

DATE: April 30, 2001

TO : Ralph R. Tremain, Regional Director
Region 14

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Illinois Power Company
Case 33-CA-13507

530-6067-6001-3740
530-6067-6001-3750
530-6067-6001-3755
530-6067-6001-6200
530-6067-6001-8000
530-6067-6001-8800

This case was submitted for advice as whether the Employer violated Section 8(a)(5) of the Act when it refused to provide information requested by the Union.

FACTS

Since at least 1997, Electrical Workers IBEW Local 51 ("the Union") has represented certain employees of Illinois Power Company ("the Employer"), including gas and electric meter readers. The parties' current 1998-2002 collective-bargaining agreements, which contains no management rights clause, states that the Employer "will not contract any work which is ordinarily and customarily done by its regular employees if as a result thereof it would become necessary concurrently to lay off or to reduce the rate of pay of any employees on the seniority list who regularly perform such work." The collective-bargaining agreement also provides that the Employer shall post vacancies or new positions, and sets forth a grievance arbitration procedure.

In late 1997, the Employer subcontracted selected meter reading routes to L.E. Myers Co.[1] The Union was given notice and, prior to the subcontracting, it executed a collective bargaining agreement with Myers covering all of Myers' employees performing gas and electric meter reading on the Employer's routes or properties.

[1] The subcontracting agreement does not specify which routes are involved.

On or about August 1, 2000,[2] the Union filed a grievance alleging that the Employer was subcontracting meter reading work in order to save on labor costs, claiming that the Employer is violating, among other things, the collective-bargaining agreement's subcontracting and vacancy bidding provisions. The Union has explained to the Region that it is concerned that the Employer has changed its subcontracting practices in the three years since subcontracting began, and that subcontracting may have contributed to the Employer's failure to post and bid meter reading vacancies.

By letter dated August 3, the Union requested the following information.

1. Copies of all contracts with any contractor who has or will provide meter reading services for the Company at any of its service areas since that work was first contracted out.

2. The weekly man hours worked per contractor employee per service area on meter reading work from the date the Company began contracting the work in question through the date of response to this information request.

3. A copy of all documents relating to or reflecting upon the Company's decision and implementation of that decision to contract out this work, including but not limited to any memos, notes and correspondence related thereto.

4. A copy of all documents relating to or reflecting upon the reasons for the Company's decision to contract out this work, including but not limited to any memos, notes and correspondence related thereto.

5. If the Company plans to continue contracting out this work, please provide all documents an other information relating thereto or reflecting thereon, including but not limited to reasons the Company used in

[2] All remaining dates are in 2000, unless otherwise noted.

making any such decision to continue contracting out this work.

By letter dated October 26, the Employer refused to provide the requested information. The Employer claims that: (1) the Union's request was made in bad faith; (2) the grievance was untimely filed and thus non-arbitrable; (3) the Union has alternative means of obtaining the information; (4) the Union's request encompasses confidential documents; and (5) the Union's request for information regarding future subcontracting is premature. The Employer apparently has provided the information sought in item 1 of the Union's August 3 request,[3] but has not provided any information in response to items 2 through 5.

ACTION

We conclude, in agreement with the Region, that the Employer has violated Section 8(a)(5) of the Act by refusing to provide the requested information.

It is well settled that an employer's bargaining obligation includes the duty to provide information requested by a union in furtherance of its responsibility as employees' collective bargaining representative.[4] The standard for determining the relevance of a union's information request is a liberal discovery-type standard.[5] Thus, when the union's request pertains to employees in the bargaining unit, such information is presumptively relevant.[6] When the information sought relates to issues outside the bargaining unit, such as subcontracting, the

[3] The Region has apparently concluded that the information requested in item 1 was provided to the Union and that the delay in providing such information was not sufficiently unreasonable to warrant a complaint allegation. In this regard, we note that an employer's duty is to furnish requested information within a reasonable time. See, e.g., Barclay Caterers, 308 NLRB 1025, 1037 (1992); Sivalls, Inc., 307 NLRB 986, 1007 (1992); Butcher Boy Refrigerator Door Co., 127 NLRB 1360 (1960), enfd. 290 F.2d 22 (7th Cir. 1961) (delay of 20 days violated Section 8(a)(5)). Given that the Union has apparently not been prejudiced by any delay, we agree with the Region's conclusion.

[4] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[5] Walter N. Yoder & Sons v. NLRB, 745 F.2d 531 (4th Cir. 1985).

[6] NLRB v. Acme Industrial Co., 385 U.S. at 437.

union must show probable or potential use for the information.[7] In particular, with respect to subcontracting, a union is permitted to review an employer's current subcontracting and monitor future subcontracting to determine the extent of its impact on the bargaining unit, to determine whether the practice has changed, to determine whether labor costs have become a factor, and to police the collective bargaining agreement.[8] Therefore, as the requested information in the instant case concerns subcontracting and the Union seeks it to determine whether the Employer has changed its subcontracting practices and whether subcontracting may have contributed to the Employer's failure to post and bid meter reading vacancies in violation of the parties' collective-bargaining agreement, the Employer is required to provide such relevant information in the absence of some recognized privilege or other reason to the contrary. We reject the defenses asserted by the Employer, as discussed below.

Bad faith

The Employer claims that the Union's information request was made in bad faith, without specifying the basis for this claim. Initially, we note that a union is presumed to be acting in good faith when it requests information from an employer, unless the contrary is shown.[9] Moreover, it is well-established that, while an employer need not comply with an information request where the sole purpose for the request is to harass the employer, a union's good faith in requesting information is shown when any of the union's reasons for seeking the information can be justified.[10] Thus, in order to be relieved of its obligation to provide information, an employer must demonstrate that the union was motivated by bad faith in

[7] Pfizer, Inc., 268 NLRB 916 (1984), enfd. 763 F.2d 887 (7th Cir. 1985). See also Public Service Co. of Colorado, 301 NLRB 238, 246 (1991) (information sought may or may not be helpful in litigating the pending grievance, but it is "sufficiently related to [unions'] duties to police the contract").

[8] See Allison Corp., 330 NLRB No. 190, slip op. at 6 (2000).

[9] Hawkins Construction Co., 285 NLRB 1313, 1314 (1987), enf. denied on other grounds 857 F.2d 1224 (8th Cir. 1988).

[10] See, e.g., Island Creek Coal Co., 292 NLRB 480, 489 (1989), enfd. mem. 899 F.2d 1222 (6th Cir. 1990); Hawkins Construction Co., 285 NLRB at 1314.

requesting the information, as well as showing that the union had no other legitimate basis for its request.

In the instant case, we conclude that the Employer has not demonstrated that the sole purpose of the Union's request was to harass the Employer. As set forth above, the Union's information request was justified based on the Union's grievance and its general right to police the Employer's subcontracting practices. While the Employer asserts that the Union's past acquiescence in its subcontracting practices indicates the bad faith of the information request, the Union asserts that it seeks the information precisely to determine whether the Employer's subcontracting practices have changed. Likewise, the Union seeks to determine whether any such changes constitute violations of the collective bargaining agreement. Thus, in the instant case there is adequate evidence that the information request was made for the legitimate purpose of supporting the Union's grievance and policing the parties' collective-bargaining agreement.[11]

Non-arbitrability

The Employer further claims that the Union's grievance was untimely filed and thus non-arbitrable. However, it is well established that procedural defects with regard to a grievance do not relieve an employer's obligation to provide relevant information.[12] Similarly, the Board will not pass on the merits of a grievance or unfair labor practice charge in determining the relevance or necessity of an information request.[13] Thus, we conclude that the

[11] To the extent that the Employer claims that the Union seeks to use the requested information in an unrelated grievance hearing, it should be noted that where the information is requested for a legitimate use, "it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses." Utica Observer-Dispatch v. NLRB, 229 F.2d 575, 577 (2d Cir. 1956).

[12] Albertson's, Inc., 310 NLRB 1176, 1179 (1993); Doubarn Sheet Metal, Inc., 243 NLRB 821, 823 (1979); Proctor & Gamble Manufacturing, 237 NLRB 747, 751 (1978) enfd. 603 F.2d 1310 (8th Cir. 1979).

[13] Island Creek Coal Co., 292 NLRB at 487. Calmat Co., 283 NLRB 1103 (1987), cited by the Employer, does not require a contrary result. In Calmat, the Board held that a union's grievance was non-arbitrable because the contractual management rights clause granted the employer broad rights in subcontracting and, further, that the employer had never

Employer's contention that the grievance is untimely and non-arbitrable fails to overcome its statutory obligation to provide the requested information.

Alternative means

The Employer's claim that the Union has alternative means of obtaining the requested information also fails to relieve it of its obligation to comply with the Union's request. The Board has held that an employer may not refuse to provide information on the ground that the union could procure the information through some other source.[14] Further, information which is not in the employer's possession but is reasonably obtainable from a third party with which the employer has a relationship must be provided.[15] In the instant case, the Employer notes that the Union has a collective bargaining relationship with subcontractor L.E. Myers, which might constitute an independent source for some of the requested information. The Employer has not, however, shown that the Union has parity of position in procuring the requested information, that the Employer cannot obtain the information, or even that it does not already have the information. Therefore, the Employer is required to provide any relevant

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indicated that cost was the reason for subcontracting. Given these findings, the union's related information request was irrelevant and unnecessary. In the instant case, by contrast, the parties' collective-bargaining agreement expressly restricts the Employer's ability to subcontract insofar as it affects unit employees, and the Union's information request seeks to determine whether labor costs are a factor in the Employer's decision to subcontract, an issue directly relevant to the contractual issue that is the subject of the pending grievance.

[14] See, e.g., New Jersey Bell Telephone Co., 289 NLRB 318, 329 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989); Washington Hospital Center, 270 NLRB 396, 401 (1984); New York Times Co., 265 NLRB 353 (1982).

[15] See, e.g., Sea Jet Trucking Corp., 327 NLRB 540, 547 (1999) ("Requested information which is not in the employer's possession must be provided if it can be obtained from a third party with whom the employer has some relationship"); Public Service Co. of Colorado, 301 NLRB at 246-247 (1991) (absent parity of position for the union to ask for the information from a third party, the employer has an affirmative obligation to obtain information or meet its burden of demonstrating the information is unavailable).

information reasonably obtainable through its relationship with subcontractors, and its failure to so do violates Section 8(a)(5) of the Act.

Confidentiality

The Employer also claims that items 3, 4, and 5 of the Union's request encompass confidential documents, without specifying which documents. In cases where a union's request for information involves assertedly confidential material, the Board is required to balance a union's need for the information against any confidentiality interest established by the employer.[16] In order to establish its confidentiality interest, an employer must provide legitimate, substantial, and specific reasons for its claim.[17] The employer must also distinguish which kinds of information it deems confidential.[18] Finally, the employer is required to propose an accommodation of the union's request with its claim of confidentiality.[19]

In the instant case, the Employer has failed to meet any of these requirements. The Employer has not asserted any privilege with respect to its relationship with to subcontractors or employees. It has not identified any of documents that it claims to be confidential. It has not proposed any compromise for resolving the confidentiality issue. Therefore, the Employer has not established its confidentiality interest, much less demonstrated that such interest outweighs the Union's right to obtain the requested information.[20]

Prematurity

In addition, the Employer claims that it need not provide the information requested in item 5, relating to

[16] Detroit Edison v. NLRB, 440 U.S. 301, 315 (1979); Lasher Service Corp., 332 NLRB No. 71 (2000); GTE California Inc., 324 NLRB 424, 426 (1997).

[17] Walt Disney World Co., 329 NLRB No. 77 (1999); Public Service Co. of Colorado, 301 NLRB at 247.

[18] E.W. Buschman Co., 277 NLRB 189, 191 (1985), enf. denied 820 F.2d 206 (6th Cir. 1987).

[19] East Tennessee Baptist Hospital, 304 NLRB 872 (1991), enf. denied in pertinent part 6 F.3d 1139 (6th Cir. 1993); Pennsylvania Power & Light Co., 301 NLRB 1104 (1991).

[20] In the event that the Employer proffers a legitimate and substantial confidentiality interest and proposes an accommodation, the Region may contact the Division of Advice for further consideration of this issue.

plans for future subcontracting of meter reading work, on the ground that the request is premature. The request, however, relates to the Employer's current plans to continue its current subcontracting practices, which are governed by the current contract, as well as to the Union's currently pending grievance regarding the Employer's subcontracting. Thus, rather than dealing with some attenuated future condition that cannot be shown to affect unit employees, the requested information is directly relevant to the Union's current claims and the terms and conditions of unit employees. Therefore, the Employer is obligated to provide the information requested in item 5, absent some privilege, such as a substantiated claim of confidentiality, as discussed above.[21]

Vagueness/Overbreadth

Finally, items 3, 4, and 5 of the Union's request are not so vague or overbroad that the Employer is excused from its obligation to provide the information. It appears that the Union's request encompasses the period from the beginning of subcontracting in 1997 to the present, even though the pending grievance was not filed until late 2000. Information predating a grievance or collective-bargaining agreement, however, may nevertheless be relevant and necessary.[22] Moreover, an employer is required to seek

[21] See, e.g., Allison Corp., 330 NLRB No. 190, slip op. at 5-6 (2000) (employer must provide information regarding subcontracting where such subcontracting may be "placing the jobs of the bargaining unit in jeopardy," and may affect "future job security of bargaining unit employees"). Cases involving pending corporate mergers may also be instructive on the issue of premature information requests. In Tri-State Generation, 332 NLRB No. 88 (2000), the Board held that the union's information request was premature because the union could not demonstrate any impact which the proposed merger would have on the bargaining unit. In the instant matter, of course, the Union has asserted that subcontracting may have eroded full-time, permanent bargaining unit work and/or foreclosed job opportunities. Thus, its request for information related to the Employer's plans to continue subcontracting is clearly relevant and necessary to determine what effect, if any, the Employer's continued subcontracting has had, and will have, on employees in the bargaining unit.

[22] See, e.g., Pratt & Lambert, Inc., 319 NLRB 529, 533 (1995) (information for subcontracting data for years prior to pending grievance or contract is relevant because it relates to the date when subcontracting began).

clarification of any ambiguous or overbroad information request; it cannot simply refuse to comply.[23] Thus, to the extent that the Employer might assert that the Union's information request is overbroad or insufficiently specific, it must seek clarification, substantiate any claim of overbreadth, or comply to the extent that the information is relevant and necessary.[24]

In addition, where the union has cited contractual provisions for which the requested information is needed to investigate possible violations, its request is deemed clear and specific.[25] In the instant case, the Union has indicated that the information sought relates directly to its concerns about subcontracting and has cited potential violations of the parties' collective bargaining agreement. Thus, we conclude that the request in the instant case is not overbroad or vague.

Accordingly, the Region should issue complaint with respect to items 2 through 5, alleging that the Employer violated Section 8(a)(5) of the Act by failing and refusing to provide relevant information in a timely manner.

B.J.K.

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[23] Beth Abraham Health Services, 332 NLRB No. 113 (2000); National Electrical Contractors Assn., 313 NLRB 770, 771 (1994); Keauhou Beach Hotel, 298 NLRB 702 (1990).

[24] For example, even though an information request regarding decisional bargaining may be overbroad, an employer nonetheless would have to provide information relevant for effects bargaining. Sea Jet Trucking Corp., 327 NLRB at 547; A-Plus Roofing, Inc., 295 NLRB 967, 973 (1989), enfd. mem. 147 LRRM 2662 (9th Cir. 1990).

[25] Doubarn Sheet Metal, Inc., 243 NLRB at 824.